Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

SENIOR AIRMAN TIMOTHY J. PENA,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR WRIT OF CERTIORARI

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April 2007

QUESTIONS PRESENTED

1. Whether the Air Force Clemency and Parole Board increased the severity of Petitioner's sentence in violation of Article 55, Uniform Code of Military Justice and the Eighth Amendment when it forced Petitioner to fulfill conditions of mandatory supervision that are not authorized by the Uniform Code of Military Justice.

2. Whether the imposition of conditions of mandatory supervision on Petitioner violates the Due Process clause because the military judge did not announce a period of mandatory supervised release or any of its conditions as part of the sentence.

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The Petitioner, Senior Airman Timothy J. Pena, USAF, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on January 16, 2007.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, *United States v. Pena*, 64 M.J. 259 (C.A.A.F. 2007), is located at Appendix A. The opinion of the United States Air Force Court of Criminal Appeals, *United States v. Pena*, 61 M.J. 776 (A.F. Ct. Crim. App. 15 September 2005) is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on January 16, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) and 10 U.S.C. § 867(a)(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution states in relevant parts:

> No person shall be ... deprived of life, liberty, or property, without due process of law.

The Eighth Amendment of the United States Constitution states:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Article 55, Uniform Code of Military Justice (UCMJ) Section 855 of Title 10, United States Code [herinafter Article 55], provides :

> Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a court-martial or inflicted upon any person subject to this chapter. The use of

irons, single or double, except for the purpose of safe custody, is prohibited.

Article 56, Uniform Code of Military Justice (UCMJ) Section 856 of Title 10, United States Code [herinafter Article 56], provides :

> The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense.

"The Secretary concerned may provide a system of parole for offenders who are confined in military correctional facilities and who were at the time of commission of their offenses subject to the authority of that Secretary." Section 952 of Title 10, United States Code.

STATEMENT OF THE CASE

This case presents the question of whether the Air Force Clemency and Parole Board, with the imposition of conditions on Petitioner through the Mandatory Supervised Release Program, increased Petitioner's sentence in violation of Article 55 and the Eighth Amendment. Furthermore, this case presents the

question of whether the failure of the military judge to announce a period of mandatory supervised release or any of its conditions as part of the sentence was a violation of the Due Process clause. The Air Force Court of Criminal Appeals affirmed the approved findings and sentence. The Court of Appeals for the Armed Forces affirmed the Air Force Court of Criminal Appeals' judgment.

1. Facts

a. Background

On 3 September 2002, Petitioner was tried by a military judge sitting alone at a general court-martial at Buckley Air Force Base, Colorado. Petitioner entered pleas of guilty pursuant to a pre-trial agreement to various charges involving adultery, indecent assaults, and indecent exposure. Petitioner was sentenced to a dishonorable discharge, confinement for one year, and reduction to the grade of E-1.

b. Mandatory Supervised Release

This case concerns Petitioner's involuntary placement on excess appellate leave subject to

conditions of mandatory supervised release on his minimum-release date from confinement. The Mandatory Supervised Release (MSR) Program became effective in August 2001. Department of Defense Instruction (DoDI) 1325.7, *Administration of Military Correctional Facilities and Clemency and Parole Authority*, July 17, 2001, paragraph 6.20 ("Release of Prisoners at their Minimum Release Date (MRD) to Mandatory Supervision"), provides that inmates who have been convicted of an offense that occurred on or after 16 August 2001 and who are not paroled are eligible for entry into the program. *See* DoDI 1325.7. DOD 1325.7-M, DOD Sentence Computation Manual, (27 Jul 2004) defines Mandatory Supervised Release (MSR) as a form of conditional release granted to individuals who have served their sentence to confinement up to their minimum release date (MRD). This form of release is served until the adjusted maximum release date (AMXRD), unless otherwise revoked or remitted by the Clemency and Parole Board concerned.

The Air Force Clemency and Parole Board (the Board) decides who will enter the program and what the conditions will be on a case-by-case basis. The Board's policy is that a prisoner will be ordered to

accept conditions of mandatory supervision under threat of a court-martial and/or a disciplinary board. *See* Clemency and Parole Boards Mandatory Supervised Release (MSR) Policy Letter, dated 23 May 2003.

Petitioner was convicted of offenses that occurred before and after 16 August 2001. He began serving his sentence to confinement when he was sentenced on 3 September 2002. After serving in confinement for several months, he applied for parole. In February 2003, the Board denied Petitioner's request for parole and instead ordered that he be released with conditions of mandatory supervision on his minimum-release date. *See* Declaration of Senior Airman Pena, dated 10 July 2003. The minimum-release date is the earliest date Petitioner could be released based on good-time credit earned. The Board ordered Petitioner to submit a plan within 30 days of the date of its letter or face disciplinary action. *Id.* The Board required Petitioner to state where Petitioner would live and with whom, provide a statement of guaranteed employment, an offer of effective assistance to obtain employment, or acceptance in a valid educational or vocational program, and verify his intent to register as a sex offender in the area where he intends to live. *Id.*

In March 2003, Mr. Greg Newbold, the Review Board Manager at the Naval Consolidated Brig Miramar, informed Petitioner that his request for parole was denied and that he would instead be involuntarily subjected to conditions of mandatory supervision. *See* Greg Newbold's Declaration. He presented Petitioner with a certificate issued by the Air Force Clemency and Parole Board, dated 12 March 2003. Significantly, Mr. Newbold told Petitioner that if he refused to accept the conditions, he could be subject to a court-martial and/or a disciplinary board for failing to obey a lawful order and/or dereliction of duty. The consequences from a disciplinary board could include the loss of good-time credit earned and confinement privileges.

c. Conditions Imposed by MSR

The certificate issued by the Board stated that the Petitioner's period of supervised release would run from 22 June 2003 to 2 September 2003. *See* SrA Timothy Pena's Declaration. The certificate mandated that upon his release Petitioner must go without delay to his designated residence, report in person to the probation officer within three days, notify the Miramar Brig of his arrival at his destination, and remain within

the limits prescribed by the probation officer. *Id.* The certificate listed nine special conditions. Petitioner must:

> 1. Enroll in a community-based sex offender treatment program *at his own expense*, and the program should have a duration of *at least 24 months*;
>
> 2. Have no contact with the victims;
>
> 3. Abstain from the use and possession of pornographic or sexually stimulating materials;
>
> 4. Consent to allow the probation officer to conduct periodic unannounced examinations of his computer and to consent to have installed on Petitioner's computer, *at Petitioner's expense*, a system to monitor Petitioner's use of the computer;

5. Not frequent adult bookstores, sex shops, topless bars, or other locations that act as a sexual stimulus;

6. Register as a sex offender;

7. Attend and participate in three Alcoholics Anonymous meetings weekly;

8. Waive confidentiality in his relations with the sponsor; and

9. Abstain from consuming alcohol.

Id.

On 17 May 2003, Petitioner submitted a letter to the Brig's commander through Mr. Newbold. *Id.* The letter challenged the decision to impose mandatory supervision and complained that some of the conditions could not be met without significant hardship. *Id.* The commander did not respond to Petitioner's letter.

It is undisputed that Petitioner earned and was entitled to good-time credit while serving in confinement. Petitioner was released from confinement on his minimum-release date, 22 June 2003. Petitioner only agreed to conditions of mandatory supervision because of the threat of a prosecution and a disciplinary board. *Id.*

When Petitioner was released, he was not allowed to stop in Colorado en-route to his designated residence in Illinois so that he could ship his household goods from Colorado to Illinois. *Id.* From the time of his release until 2 September 2003, he attended Alcoholics Anonymous classes three nights each week and a sex offender treatment program on each Monday. *Id.* He also went to appointments on an *ad hoc* basis and he was required to report to the parole officer within 30 minutes of being notified that he must provide a urine sample. *Id.*, para. 7. During this period, he was unable to find work to support his family because he was required to fulfill conditions of mandatory supervision. *Id.*, para. 6.

2. Proceedings Below

The Court of Appeals for the Armed Forces determined that the conditions of mandatory supervised release on Petitioner did not constitute cruel or unusual punishment in violation of the Eight Amendment and that Petitioner did not demonstrate that the mandatory supervised release program produced an impermissible increase in punishment adjudged by court-martial. The Court of Appeals for the Armed Forces affirmed the Court of Criminal Appeals' ruling.

REASONS FOR GRANTING THE WRIT

In its decision below, the United States Court of Appeals for the Armed Forces incorrectly concluded that the conditions of mandatory supervised release imposed on Petitioner did not constitute cruel and unusual punishment. Furthermore, the lower court incorrectly concluded that Petitioner failed to demonstrate that his involuntary participation in Mandatory Supervised Release (MSR) program produced an impermissible increase in punishment adjudged by court-martial.

In *Estelle v. Gamble,* 429 U.S. 97, 102-03 (1976), this Court said the Eighth Amendment prohibits "punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society,' . . . or which 'involve the unnecessary and wanton infliction of pain[.]'' *See also Trop v. Dulles*, 356 U.S. 86 (1958).

The Eighth Amendment and Article 55, UCMJ, prohibit the infliction of cruel and/or unusual punishment on military members. Whenever the severity of a sentence is unlawfully increased, Article 55, UCMJ, and the Eighth Amendment are violated. *See United States v. White*, 54 M.J. 469, 472 (C.A.A.F. 2001).

The Air Force Clemency and Parole Board unlawfully modified and increased the severity of Petitioner's approved sentence by imposing conditions of mandatory supervision upon him. None of the conditions are authorized by the Uniform Code of Military Justice (UCMJ). No other statute authorizes the forcible imposition of such conditions on Petitioner. And there is no case law that supports the imposition of such conditions solely on the basis of a regulation and in

the absence of a statute. The imposition of such conditions resulted in illegal post-trial punishment.

Petitioner was ordered to accept conditions of mandatory supervision against his will. He was threatened to accept them on pain of a court-martial and/or a disciplinary board and he begrudgingly accepted those conditions. Petitioner has now involuntarily fulfilled those conditions.

Each of the conditions imposed on Petitioner was a form of punishment. Besides being ambiguous, they infringed upon a number of his constitutional rights. Those conditions that required his presence and time, such as attendance at a treatment program and other meetings, impacted his liberty interest. Likewise, those that prohibited him from doing certain things, such as consuming alcohol and possessing legal materials, or that prohibited him from going to certain places or associating with certain types of persons, also adversely impacted his liberty interest, his right to privacy, and his right to assembly and religion. Those that required him to pay money, such as for payment for treatment, computer monitoring, or transportation--impacted his property interest. Those that required that he answer questions, such as to the parole officer or while

submitting to a polygraph, impacted his right against self-incrimination. Those that required that he submit to a plethysmograph impacted his right to privacy. Those that required that he submit a urine sample infringed upon his right against unreasonable searches and seizures. Those conditions that prohibited him from changing residences or employment infringed upon his right to travel. All of the conditions were a type of sanction. Congress recognized that these types of conditions were punishment when it expressly authorized their use as punishment in civilian criminal trials. *See* 18 U.S.C. § 3583 ("Inclusion of a term of supervised release after imprisonment [in the sentence]"). Because these conditions, unauthorized punishments, Petitioner was subjected to illegal post-trial punishment in violation of the Eighth Amendment and Article 55, UCMJ.

Article 56, UCMJ, states that the punishment a court-martial may impose may not exceed the limits prescribed by the President. By implication, the types of punishment that may be imposed are also limited to those prescribed by the President. For Petitioner's offenses, the President has prescribed a reprimand, forfeiture of pay and allowances, a fine, reduction in pay grade, restriction to specified limits, hard labor

without confinement, confinement, and a punitive discharge. Rule for Courts-Martial (R.C.M.) 1003(b) ("Authorized punishments"). The Rule expressly states that only those punishments may be adjudged.

In the present case, the Board not only imposed unauthorized punishment, but it also *increased* the sentence without any statutory authority. Petitioner was to fulfill the conditions only after successfully serving his sentence to confinement based on good-time credit earned.

Petitioner acknowledges that Congress has authorized the Secretary of Defense to provide a system of parole for military offenders who are in confinement. 10 U.S.C. § 952. Parole, however, is something that an accused applies for and voluntarily agrees to. DoDI 1325.7, para. 6.17.1. When an accused is placed on parole, the accused agrees to the terms and conditions of parole. *See* ¶97a.c.(2), *Manual for Courts-Martial* (2005 ed.) ("Parole" is defined as "word of honor" because it is agreed to). When this promise is forced on someone under the pain of disciplinary or criminal sanction, it ceases to be "parole." A true parole program requires the inmate to voluntarily apply for and accept

conditions. Any other view of parole would be unfaithful to Congressional intent and the Department of Defense Instruction (DoDI) 1325.7.

The conditions of mandatory supervision were not authorized under the UCMJ or any other statute and they changed and increased the severity of Petitioner's approved sentence, thereby violating Petitioner's rights under Article 55 and the Eight Amendment.

Petitioner's Fifth Amendment rights were also violated, contrary to the Court of Appeals for the Armed Forces decision.

The Fifth Amendment provides that "No person . . . shall be deprived of life, liberty, or property, without due process of law." Rule for Courts-Martial (R.C.M.) 1007(a) states that the sentence must be announced in the presence of all parties, including the accused. Manual for Courts-Martial, United States (MCM) (2005 ed.). Although the Court of Appeals for the Armed Forces has not had occasion to consider R.C.M. 1007(a) as it applies to mandatory supervised release, other federal courts that have imposed conditions of supervised release have consistently held that such

conditions must be authorized by statute and announced at trial as part of the sentence for its imposition to be legal. *See United States v. Falu,* 129 F. Supp. 2d 424 (D. P.R. 2000); *United States v. Wise*, 391 F.3d 1027 (9th Cir. 2004). The imposition of the term and conditions of supervised release in federal criminal trials is always a part of the sentence announced at trial and the same should be true in courts-martial, if they are to be imposed at all.

There are several important policy reasons why the Due Process Clause requires this outcome. One consideration is that the accused should have an opportunity to recommend, comment on, or otherwise object to proposed terms and conditions of mandatory supervision. This consideration goes to Petitioner's right to due process of law at its most basic level. Petitioner was not given any opportunity to object to the imposition of mandatory supervision or its conditions.

Another reason is that the record cannot be fully developed for purposes of appeal. As it is, the Air Force Clemency and Parole Board, which is not a judicial body, determined that mandatory supervision was appropriate and what the conditions would be.

Such determinations are purportedly made on the basis of "all pertinent information," including statements from the victims and the witnesses. None of this information is contained in the record of trial. Petitioner has no idea what the Air Force Clemency and Parole Board did or did not consider. Petitioner did not have an opportunity to challenge the information or cross-examine witnesses as he would in a federal criminal trial.

The conditions of supervised release are not reasonably related to a legitimate penological interest. See *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989) (prison regulations are lawful if they reasonably relate to a legitimate penological interest.) Aside from the fact that the conditions of supervised release are not authorized or reasonably related to a legitimate penological interest, any information that the Board could have relied upon should have been available to the court-martial when Petitioner was sentenced. The offenses and the victims remain the same. Petitioner's behavior in confinement is not a factor since Petitioner apparently behaved well in confinement and earned good-credit time or he would not have been considered for early release under mandatory supervision. And similar to *Wolff v. McDonnell*, 418 U.S. 539 (1974)

(Due process required advance notice where a prison's policies take away good time, a right provided by state statute creating an interest for petitioner), taking away Petitioner's good-time credit in order to impose mandatory supervised release violates the Due Process Clause.

Even in cases where the government has a statutory right to appeal a sentence in federal criminal trials, the defendant has an expectation of finality in the sentence once the appeals have ended. *United States v. DiFrancesco*, 449 U.S. 117, 136 (1980) (holding that the expectation of finality for a defendant serving confinement arises when the appeal is concluded or the time to appeal is expired). The Seventh and Ninth Circuits have further held that the defendant's expectation of finality can arise even earlier in such cases: when the defendant completes his sentence of incarceration. *United States v. Daddino*, 3 F.3d 262 (7th Cir. 1993) (reversing an order amending the sentence to require the defendant to pay the costs of incarceration and supervision and remanding with instructions for the district court to vacate that portion of the sentence); *United States v. Arrellano-Rios*, 799 F.2d 520, 524 (9th Cir. 1986). In the present case, the government does not have a statutory right to appeal the sentence, the

government is not appealing the sentence, and Petitioner has already completed his sentence to confinement. Petitioner, therefore, should have an expectation of finality in his sentence.

The military judge did not announce any term or condition of mandatory supervised release as part of Appellant's sentence and Appellant did not have an opportunity to object to the additional punishment. The additional punishment was clearly laid out by the Air Force Clemency Parole Board in the nine conditions that it required Petitioner to fulfill. The Court of Appeals for the Armed Forces incorrectly held that the imposition of mandatory supervised release did not violate R.C.M. 1007(a) and Petitioner's due process rights.

CONCLUSION

The Court of Appeals for the Armed Forces erred when it concluded that the conditions of mandatory supervised release imposed on Petitioner did not constitute cruel and unusual punishment. It further erred when it failed to find that the conditions of mandatory supervision on Petitioner violated the Due Process Clause. Thus, the decision of the court below represents a significant departure from this Honorable Court's Fifth

and Eighth Amendment jurisprudence. Therefore, Petitioner respectfully requests this Honorable Court to grant his petition for a writ of certiorari.

Respectfully submitted,

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April 2007

Appendix A

UNITED STATES, Appellee

v.

TIMOTHY J. PENA, Senior Airman
U.S. Air Force, Appellant

64 M.J. 259

United States Court of Appeals for the Armed Forces

Argued October 16, 2006
Decided January 16, 2007

EFFRON, C.J., delivered the opinion of the court, in which ERDMANN, J. and BAKER, J., joined. STUCKY and RYAN, JJ., did not participate.

Counsel

For Appellant: Captain Vicki A. Belleau (argued); Lieutenant Colonel Mark R. Strickland and Major Sandra K. Whittington (on brief).

For Appellee: Captain Jefferson E. McBride (argued); Colonel Gary F. Spencer and Lieutenant Colonel Robert V. Combs (on brief).

Military Judge: Patrick M. Rosenow

Chief Judge EFFRON delivered the opinion of the Court.

A general court-martial composed of a military judge sitting alone convicted Appellant, pursuant to his pleas, of attempted indecent assault, indecent assault, indecent exposure, indecent language, and adultery, in violation of Articles 80 and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 880, 934 (2000), respectively. The sentence adjudged by the court-martial and approved by the convening authority included a dishonorable discharge, confinement for one year, and reduction to the lowest enlisted grade. The convening authority deferred mandatory forfeitures until the date of the

action, and waived automatic forfeitures for a period of six months, directing payment of the mandatory forfeitures to Appellant's spouse for the benefit of his children. The United States Air Force Court of Criminal Appeals affirmed. United States v. Pena, 61 M.J. 776 (A.F. Ct. Crim. App. 2005).

On Appellant's petition, we granted review of the following issues:

> I. WHETHER THE APPELLANT WAS IMPROPERLY PLACED ON EXCESS APPELLATE LEAVE AND DENIED PAY AND ALLOWANCES IN VIOLATION OF ARTICLE 76a, UCMJ, WHEN HIS SENTENCE TO CONFINEMENT WAS NOT COMPLETED OR REMITTED AND HE WAS FORCED TO FULFILL CONDITIONS OF MANDATORY SUPERVISION UPON HIS RELEASE FROM CONFINEMENT.
>
> II. WHETHER THE AIR FORCE CLEMENCY AND PAROLE BOARD INCREASED THE SEVERITY OF APPELLANT'S SENTENCE IN

VIOLATION OF ARTICLE 55, UCMJ, AND THE EIGHTH AMENDMENT WHEN IT FORCED APPELLANT TO FULFILL CONDITIONS OF MANDATORY SUPERVISION THAT ARE NOT AUTHORIZED BY THE UCMJ.

III. WHETHER THE IMPOSITION OF CONDITIONS OF MANDATORY SUPERVISION ON APPELLANT VIOLATES THE DUE PROCESS CLAUSE BECAUSE THE MILITARY JUDGE DID NOT ANNOUNCE A PERIOD OF MANDATORY SUPERVISED RELEASE OR ANY OF ITS CONDITIONS AS PART OF THE SENTENCE.

IV. WHETHER APPELLANT'S PLEAS OF GUILTY ARE IMPROVIDENT BECAUSE THE MILITARY JUDGE DID NOT INFORM APPELLANT PRIOR TO ACCEPTING HIS PLEAS THAT HE COULD BE ADDITIONALLY PUNISHED IN UNSPECIFIED WAYS.

Appellant, who was sentenced to confinement for one year, served all but seventy-two days of that period in confinement at the Naval Consolidated Brig Miramar, in San Diego, California. During the remaining seventy-two days, the Government placed Appellant in the Department of Defense (DoD) Mandatory Supervised Release program against his wishes.

The granted issues concern Appellant's early release from his sentence to confinement. Part I of this opinion summarizes the relationship between the DoD Mandatory Supervised Release program and other confinement and release programs in the military justice system. Part II describes the sentencing proceedings at Appellant's trial and the terms and conditions applied to Appellant through the Mandatory Supervised Release program. Part III considers whether those terms or conditions provide a basis for relief under applicable standards of review. For the reasons set forth below, we affirm.

I. THE DoD MANDATORY SUPERVISED RELEASE PROGRAM

Persons sentenced to confinement by a court-martial serve their period of imprisonment in facilities administered by the DoD, subject to exceptions not pertinent to the present appeal. Dep't of Defense Dir. 1325.4, Confinement of Military Prisoners and Administration of Military Correctional Programs and Facilities (Aug. 17, 2001) [hereinafter DoD Dir. 1325.4]. The DoD traditionally has administered a variety of early release procedures for persons in confinement, such as good time and earned credits, return to duty programs, and parole. See Dep't of Defense, Instr. 1325.7, Administration of Military Correctional Facilities and Clemency and Parole Authority,

enclosure 26, para. E26.1-E26.5. (July 17, 2001, incorporating Change 1, June 10, 2003) [hereinafter DoD Instr. 1325.7].

Parole is a form of conditional release from confinement under the guidance and supervision of a United States probation officer. Id. at enclosure 2, para. E2.1.11. In addition, parole is a voluntary program, in which the inmate applies to participate during the balance of his or her period of approved confinement. Id. at para 6.17; Dep't of

Defense, Sentence Computation Manual 1325.7-M, at AP1.1.12 (July 27, 2004, Administrative Reissuance, incorporating Change 1, Aug. 30, 2006) [hereinafter DoD Manual 1325.7-M]. The decision as to whether parole should be granted is vested in the Clemency and Parole Boards of the military departments. The decision is highly discretionary. See DoD Instr. 1325.7, at para. 6.16. Prior to release on parole, the inmate must have an approved parole supervision plan, and agree in writing to abide by the plan and conditions of supervision. Id. at para. 6.17.9.1. Violation of the terms and conditions may result in revocation of parole. Id. at para. 6.17.10. In

general, the supervision of persons on parole is designed to enhance the person's reintegration into civilian society. See id. at para. 6.17.9.2.

In 2001, the DoD introduced an additional early release mechanism, the Mandatory Supervised Release program. Mandatory Supervised Release covers specified classes of prisoners who have served sufficient time in confinement to be considered for parole, but who are not granted parole. Id. at para. 6.20.1. As with parole, Mandatory Supervised Release applies from the time of release from prison until the end of the prisoner's approved sentence, and it may be revoked for violation of the terms and conditions of the program. Id. at paras. 6.17.9.4, 6.17.9.6, 6.20.6.;DoD Manual 1325.7-M, at AP1.1.12.

In contrast to parole, which is a voluntary program, a prisoner may be placed involuntarily on Mandatory Supervised Release. See generally Policy Letter, Clemency and Parole Boards Mandatory Supervised Release Policy (May 23, 2003) (in Brief of Appellant at app. E). In addition to the conditions that may be imposed during parole, the Clemency and Parole Board may use the

Mandatory Supervised Release program to impose "any additional reasonable supervision conditions . . . that would . . . further an orderly and successful transition to civilian life for released prisoners, and which would better protect the communities into which prisoners are released." DoD Instr. 1325.7, at para. 6.20.2. A prisoner who refuses to accept Mandatory Supervised Release or the conditions imposed by the Clemency and Parole Board is subject to discipline, including trial by court-martial. Clemency and Parole Boards Mandatory Supervised Release Policy Letter (May 23, 2003). See Policy Letter at P E.5.

Mandatory Supervised Release differs in significant respects from the authority of the federal civilian courts to include in a sentence "a term of supervised release after imprisonment." 18 U.S.C. § 3583(a) (2000). Unlike the federal civilian program, which is based on express statutory authority and involves terms that are adjudged as part of the sentence, the military's Mandatory Supervised Release program is based on executive authority, and involves terms that are imposed by executive branch officials well after completion of trial.

II. THE ADJUDICATION AND ADMINISTRATION OF APPELLANT'S SENTENCE

A. THE PROCEEDINGS AT TRIAL

After Appellant entered a plea of guilty to various charged offenses, the military judge conducted an inquiry into the providency of the plea. See Rule for Courts-Martial (R.C.M.) 910. As part of the inquiry, the military judge explained the maximum punishment Appellant faced, based solely on the offenses to which he pled guilty. Appellant agreed with the military judge that he faced a dishonorable discharge from the service, forfeiture of all pay and allowances, forty-nine years of confinement, reduction to the grade of E-1, and a fine. The military judge asked Appellant if he had any questions about the specific punishments he faced, and Appellant responded in the negative. In addition, the military judge asked defense counsel whether he and Appellant had discussed the administrative ramifications of the punishments. Defense counsel responded in the affirmative.

Neither the military judge nor defense counsel mentioned any specific administrative consequence.

Subsequently, during the sentencing proceeding the military judge reminded Appellant that he was facing a lengthy amount of confinement and asked him whether he had any additional questions. Appellant responded in the negative. The military judge sentenced Appellant to a dishonorable discharge, one year of confinement, and reduction to the grade of E-1.

B. PLACEMENT OF APPELLANT IN THE MANDATORY SUPERVISED RELEASE PROGRAM

The Air Force assigned Appellant to serve his period of confinement at the Naval Consolidated Brig Miramar. During that period, the Air Force Clemency and Parole Board determined that he would not be granted parole. The Board ordered him to participate in the Mandatory Supervised Release program for a seventy-two day period, terminating on his maximum release date at the end of the adjudged period of confinement.

The Certificate of Mandatory Supervised Release (certificate) issued to Appellant by the Board set forth sixteen conditions generally applicable to persons in the program, along with an attachment

containing nine additional conditions tailored to Appellant's circumstances. The additional conditions required Appellant to: (1) participate in a community-based sex offender treatment program with a duration of at least twenty-four months, at his own expense; (2) have no contact with the victims without the prior approval of his probation officer; (3) abstain from the use and possession of pornography or sexually stimulating materials; (4) consent to periodic examinations of his computer, to include retrieval and copying of all data from his computer and/or removal of his computer equipment for the purpose of conducting a more thorough inspection; and consent to having installed on his computer, at his expense, any hardware or software monitoring systems; (5) abstain from adult book stores, sex shops, topless bars, or other locations that act as a sexual stimulus; (6) register as a sex offender in accordance with state law; (7) attend and participate in three

meetings weekly concerning alcohol and narcotics abstention; (8) waive confidentiality in his relations with the sponsor of the treatment program so that his probation officer may monitor his progress in the program; and (9) abstain from consuming alcohol. The certificate provided that the term of mandatory supervision would expire on Appellant's maximum release date. The confinement officials at Miramar advised Appellant that he was required to accept the conditions in the certificate. If Appellant refused to do so, he could be prosecuted in a court-martial for failure to obey an order or dereliction of duty, and he could be sent before a disciplinary board with the potential of losing good time credits and confinement privileges.

A month prior to his proposed release under the Mandatory Supervised Release program, Appellant submitted a letter to the Commander of the confinement facility at Miramar requesting permission to decline participation in the program without losing his good time credits. Appellant stated that he could adhere to all of the conditions in the attachment except for participation in the sex offender treatment program. He noted that while

the state of Illinois would pay for his participation in a treatment program in Chicago, he would have to make a six-hour round trip from his expected place of residence. He added that he had not yet obtained a job, his wife was unable to work due to the imminent birth of a child, and his family would have no income. He also noted that his mother would provide his family with room, board, and incidentals, but that the burden would stretch "her financial situation beyond its limits." He stated that "the bottom line is we cannot pay for transportation [to the treatment program] until I have secured a job and financially reestablished [my] family."

Appellant did not receive a response. When he reached his minimum release date with seventy-two days left in his period of confinement, he was released into the Mandatory Supervised Release program on June 22, 2003. The post-trial record contains a declaration signed by Appellant on July 10, 2003, in which he noted a number of problems created by his participation in the Mandatory Supervised Release program. The declaration notes that he was unable to stop in Colorado to ship his household goods to Illinois, that he incurred a ten

dollar per week expenditure for transportation to the sex offender treatment program, that he was required to attend Alcoholics Anonymous classes three times a week at night and sex offender treatment classes once a week during the day, that he had various other appointments and a requirement to give a urine sample on short notice every two weeks, and that the conditions of mandatory supervision left him unable to find work to support his family. The declaration was submitted when Appellant had completed eighteen out of the seventy-two days of his period of mandatory supervised release. Although the declaration noted that he was not employed, it did not describe his living circumstances, sources of support, or overall financial condition. The record contains no further information documenting the impact of the Mandatory Supervised Release program on Appellant during the remaining fifty-four days that he was in the program. In addition, the record contains no indication that he was subjected to any of the conditions of the Mandatory Supervised Release program after the end of the seventy-two day period.

III. DISCUSSION

A. THE TERMS AND CONDITIONS OF APPELLANT'S MANDATORY SUPERVISED RELEASE (ISSUES II, III, AND IV)

At the outset, we note that Appellant has challenged the authority of the DoD to establish the Mandatory Supervised Release program in the absence of express statutory authority. Appellant asks us to invalidate a program under which the DoD releases individuals from prison prior to the completion of their adjudged sentence to confinement. On direct appeal, the scope of our review does not extend to supervision of all aspects of the confinement and release process. United States v. Towns, 52 M.J. 830, 833 (A.F. Ct. Crim. App. 2000), aff'd, 55 M.J. 361 (C.A.A.F. 2001). Our review of post-trial confinement and release conditions on direct appeal is limited to the impact of such conditions on the findings and the sentence. See Article 67(c), UCMJ, 10 U.S.C. § 867(c) (2000); United States v. Spaustat, 57 M.J. 256, 263 (C.A.A.F. 2002) (responsibility for determining how much good time credit, if any, will be awarded is an

administrative responsibility, vested in the commander of the confinement facility). Accordingly, our review in the present appeal focuses on whether the post-trial conditions at issue: (1) constituted cruel or unusual punishment or otherwise violated an express prohibition in the UCMJ; (2) unlawfully increased Appellant's punishment; or (3) rendered his guilty plea improvident. To the extent that the issues raised by Appellant otherwise challenge the administration of the Mandatory Supervised Release program, those matters -- including questions regarding the underlying legal authority for the program -- are not before us on direct review.

1. Cruel or Unusual Punishment

The Eighth Amendment prohibits "cruel and unusual punishments." U.S. Const. amend. VIII. Similarly, Article 55, UCMJ, 10 U.S.C. § 855 (2000), prohibits "cruel or unusual punishment." Article 55, UCMJ, also prohibits specified punishments, such as use of irons except for the purpose of safe custody, which are not at issue in the present appeal. See also Article 12, UCMJ, 10 U.S.C. § 812 (2000) (prohibition on confinement in

immediate association with enemy prisoners).

We review allegations of cruel or unusual punishment under a de novo standard. United States v. White, 54 M.J. 469, 471 (C.A.A.F. 2001). In our evaluation of both constitutional and statutory allegations of cruel or unusual punishment, we apply the Supreme Court's Eighth Amendment jurisprudence "in the absence of legislative intent to create greater protections in the UCMJ." United States v. Lovett, 63 M.J. 211, 215 (C.A.A.F. 2006).

The Eighth Amendment prohibits punishments that are "'incompatible with the evolving standards of decency that mark the progress of a maturing society, or which involve the unnecessary and wanton infliction of pain.'" Id. at 214 (quoting Estelle v. Gamble, 429 U.S. 97, 102-03, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)). Although the conditions at issue in the present appeal implicate other legal issues, as discussed below, none of these conditions constitute cruel or unusual punishment within the Eighth Amendment standards articulated by the Supreme Court. E.g., 18 U.S.C. § 3583

(2000) (describing the conditions of mandatory release that may be imposed in criminal trials in the federal district courts).

2. Impact on the adjudged sentence

Appellant contends that his punishment was increased without providing the requisite constitutional, statutory, and regulatory components of notice and an opportunity to respond. We review such claims de novo. United States v. Rollins, 61 M.J. 338, 343 (C.A.A.F. 2005).

The military sentencing process provides notice of the punishments at issue, an adversarial proceeding, and formal announcement of the sentence. See U.S. Const. amend. V; Articles 53, 56, and 60, UCMJ, 10 U.S.C. §§ 853, 856, 860 (2000); R.C.M. 1001-1007. A servicemember "cannot be subjected to a sentence greater than that adjudged" by the court-martial. United States v. Stewart, 62 M.J. 291, 294 (C.A.A.F. 2006) (citing Waller v. Swift, 30 M.J. 139, 143 (C.M.A. 1990)). Cf. White, 54 M.J. at 472 (noting our Court's "authority to ensure that the severity of the adjudged and approved sentence has not been unlawfully increased by prison officials").

Although reviewing authorities have the power to commute a sentence to a different form of punishment, see Article 60(c)(2), UCMJ; Article 71, UCMJ, 10 U.S.C. §§ 871 (2000), this authority may not be exercised in a manner that increases the severity of the punishment. United States v. Carter, 45 M.J. 168, 170 (C.A.A.F. 1996); Waller, 30 M.J. at 143; see R.C.M. 1107(d)(1), 1107(f)(2). The question of whether a change in the form of punishment increases the severity of the punishment is contextual, requiring consideration of "all the circumstances in a particular case." Carter, 45 M.J. at 170.

The foregoing considerations apply only to matters that constitute "punishment" within the meaning of the criminal law. As a general matter, the collateral administrative consequences of a sentence, such as early release programs, do not constitute punishment for purposes of the criminal law. See, e.g., United States v. Griffin, 25 M.J. 423, 424 (C.M.A. 1988) (impact of conviction on retirement benefits is a collateral administrative consequence, inappropriate for consideration at sentencing); United States v. Murphy, 26 M.J. 454, 457 (C.M.A. 1988) (classifying eligibility for a particular

squadron as a collateral administrative consequence not to be considered in sentencing); United States v. Hannan, 17 M.J. 115, 123 (C.M.A. 1984) (recognizing parole eligibility as a collateral administrative consequence of sentence). Whether a particular aspect of an early release program is administered in a manner that constitutes punishment requires a case-specific inquiry. Compare California Dep't of Corrections v. Morales, 514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995), with Lynce v. Mathis, 519 U.S. 433, 117 S. Ct. 891, 137 L. Ed. 2d 63 (1997). Cf. United States v. Fischer, 61 M.J. 415, 420 (C.A.A.F. 2005) (setting forth factors to be considered in determining whether governmental actions are regulatory or punitive in nature) (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963))).

The terms and conditions of Appellant's Mandatory Supervised Release, as initially conveyed to him, potentially raised serious questions as to whether Appellant's sentence had been increased. On its face, the attachment accompanying the Certificate of Mandatory Release suggested that Appellant was

required to subject himself involuntarily to a sex offender treatment program for twenty-four months, a period extending well beyond his maximum release date. In addition, the attachment suggested that Appellant was required to expend a substantial amount of his own funds to pay for the treatment program and computer software. As the record indicates, however, and as defense counsel confirmed during oral argument, none of the conditions were imposed upon Appellant after his maximum release date, and he was not required to pay for his treatment program or any computer software.

Although the defense brief sets forth a facial challenge to the Mandatory Supervised Release program and the conditions communicated to Appellant prior to his release, the defense has provided few details as to any actual impact on Appellant. On May 17, 2003, prior to his release, Appellant submitted a request for exemption from one of the conditions, participation in a treatment program, based upon concern as to what might occur upon release. That statement provides no information as to what actually happened to Appellant after he was released. On July 10, 2003,

eighteen days after he was released under the Mandatory Supervised Release program, Appellant signed a declaration describing various difficulties that he had encountered in moving his household goods and obtaining employment as result of the requirements imposed by the Mandatory Supervised Release program. He also noted that he was required to expend ten dollars a week for transportation to a treatment program. The declaration, however, does not indicate what impact, if any, the Mandatory Supervised Release program had on Appellant's sentence during the remaining fifty-four days prior to his maximum release date.

In the context of an issue that requires a showing of increased punishment, it is not sufficient to show that the conditions of mandatory release imposed some burdens on a released prisoner. All conditions of release impose burdens to some degree. Those burdens, however, must be assessed in the context of release from a sentence to confinement. The question in each case is whether the burdens are such that they result in an increase in the punishment of confinement adjudged by the court-martial. Carter, 45 M.J. at 170. Such an assessment requires a case-specific analysis. See id.

We do not take lightly the impact of the Mandatory Supervised Release program on Appellant during the initial eighteen day period or during the subsequent fifty-four days. Likewise, we do not disregard the possibility that the Mandatory Supervised Release program could be imposed in a manner that increases the punishment above the punishment adjudged by a court-martial. The burden, however, is on the party challenging the conditions to demonstrate that there has been an increase above the punishment of confinement imposed at trial.

When an appellant asks us to review the post-trial administration of a sentence, we are typically confronted by issues in which the pertinent facts are not in the record of trial. In such a case, it is particularly important that the appellant provide us with a "clear record" of the facts and circumstances relevant to the claim of legal error. See United States v. Miller, 46 M.J. 248, 250 (C.A.A.F. 1997). The information about the personal, psychological, economic, and family impact of such measures is primarily in the control of the party appealing the sentence, and that party bears the responsibility of

submitting detailed documentation. The generalized statements in Appellant's July 10, 2003, declaration, which cover only a portion of the time Appellant was in the Mandatory Supervised Release program, do not provide the clear record upon which we could evaluate whether the conditions of mandatory supervised release in this case produced an increase in Appellant's sentence. Accordingly, Appellant has not demonstrated that his participation in the Mandatory Supervised Release program produced an impermissible increase in the punishment adjudged by the court-martial.

3. Effect on the providency of the guilty plea

We review claims as to the providency of a plea under a de novo standard. United States v. Harris, 61 M.J. 391, 398 (C.A.A.F. 2005). An appellant who challenges the providency of a guilty plea must demonstrate "a substantial basis in law and fact for questioning the guilty plea." United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991) (quotation marks omitted). As a general matter, the military judge does not have an affirmative obligation to initiate an inquiry into early release programs as part of the plea inquiry. See Hannan, 17 M.J. at 123. When the

challenge concerns an appellant's claimed misunderstanding of the collateral consequences of a court-martial, such as an early release program, an appellant must demonstrate that:

> the collateral consequences are major and the appellant's misunderstanding of the consequences (a) results foreseeably and almost inexorably from the language of a pretrial agreement; (b) is induced by the trial judge's comments during the providence inquiry; or (c) is made readily apparent to the judge, who
>
> nonetheless fails to correct that misunderstanding. In short, chief reliance must be placed on defense counsel to inform an accused about the collateral consequences of a court-martial conviction and to ascertain his willingness to accept those consequences.

United States v. Bedania, 12 M.J. 373, 376 (C.M.A. 1982). In the present case, Appellant has not

demonstrated that the collateral consequences actually imposed increased his punishment. See supra Part III.A.2. Moreover, neither the text of the plea agreement nor the record of the military judge's plea inquiry contains any language that would have placed an obligation on the military judge to address the Mandatory Supervised Release program at that time. See United States v. Miller, 63 M.J. 452, 457 (C.A.A.F. 2006). We also note that Appellant has not claimed that his counsel was ineffective with respect to explaining collateral consequences, so we need not address whether counsel was under any obligation to do so. See id. at 458. Under the circumstances of this case, Appellant has not demonstrated that his plea was improvident.

B. APPELLATE LEAVE (ISSUE I)

During Appellant's period of confinement, he

forfeited his entitlement to pay and allowances following a six-month period in which the forfeitures were waived by the convening authority. See Article 58b(a), UCMJ, 10 U.S.C. § 858b(a) (2000) (providing for mandatory forfeiture of pay and allowances "during any period of confinement

or parole" when the approved sentence of a general court-martial includes a punitive discharge). Following his release from confinement under the Mandatory Supervised Release program, Appellant was placed on appellate leave under Article 76a, UCMJ, § 10 U.S.C. 876a (2000) (providing discretion, under military department regulations, to place a service member on involuntary appellate leave after the convening authority's action pending completion of appellate review when the sentence includes an unsuspended punitive discharge). The pertinent Air Force regulation provides: "An accused awaiting appellate review of an unsuspended punitive separation, who . . . already completed the period of confinement, may be involuntarily placed on excess leave . . . ." Dep't of the Air Force, Instr. 51-201, Administration of Military Justice para. 9.12.1 (Nov. 2, 1999). Although a person on involuntary appellate leave remains subject to military jurisdiction and possible recall, the individual returns to civilian life throughout the period of leave. See 10 U.S.C. § 701(e) (2000) (providing that any leave prior to discharge is still considered military service); 10 U.S.C. § 706(c) (2000) (acknowledging that a person on excess leave may obtain civilian employment). While on

involuntary appellate leave, the individual is not entitled to pay and allowances. See Dep't of Defense, Dir. 7000.14-R, Department of Defense Financial Management Regulation, volume 7A, ch. 35, § 350101, para. B (Nov. 2005) (requiring pay only for the portion of appellate leave that a servicemember chooses to take as accrued leave); Dep't of the Air Force, Instr. 36-3003, Military Leave Program para. 6.8 (Oct. 20, 2005) (providing excess leave for a servicemember that has exhausted accrued leave, and noting that "[e]xcess leave is a no-pay status").

Appellant contends that he should not have been placed on involuntary appellate leave for two reasons. First, he contends that as a practical matter he remained on active duty because the conditions imposed upon him by the Mandatory Supervised Release program constituted military duties for which he should have been paid. We need not decide whether such a claim is within the scope of our review under Article 67, UCMJ, because Appellant has not demonstrated that the conditions of his supervised release were so restrictive in nature or duration that they had the claimed effect of retaining him on active duty without pay. See supra Part

III.A.2. Second, he contends that he did not "complete" his period of confinement under the Air Force Regulation because he was under a continuing

threat of return to prison if he violated the terms of his release. The relationship between completion of confinement and commencement of leave is a matter governed by administrative regulations and service practices. Appellant has not demonstrated that the applicable regulations, either on their face or as applied, violated Article 76a, UCMJ, or any other provision of the UCMJ. Under these circumstances, Appellant has not demonstrated that this claim falls within the scope of our review under Article 67, UCMJ.

IV. DECISION

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

Appendix B

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES
v.
Senior Airman TIMOTHY J. PENA

United States Air Force

61 M.J. 776

15 September 2005

GCM convened at Buckley Air Force Base, Colorado on 3 September 2002. Military Judge: Patrick M. Rosenow.

Appellate Counsel for Appellant: Major Andrew S. Williams (argued), Colonel Beverly B. Knott, Colonel Carlos L. McDade, Major Terry L. McElyea, and Major Sandra K. Whittington.

Appellee Counsel for the United States: Captain Stacey J. Vetter (argued), Colonel LeEllen Coacher, Lieutenant colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major John C. Johnson, and Major Jin-Hwa Frazier.

Before
BROWN, MOODY, and FINCHER
Appellate Military Judges

OPINION OF THE COURT

SMITH, Judge:

Before STONE, MOODY, and SMITH, Appellate Military Judges.

Consistent with his pleas, the appellant was found guilty of several sex-related offenses that occurred over a three-year period. Apart from a single charge of attempted indecent assault, in violation of Article 80, UCMJ, 10 U.S.C. § 880, the appellant's misconduct was detailed in 15 separate specifications that alleged violations of Article 134, UCMJ, 10 U.S.C. § 934. A military judge sitting as

a general court-martial sentenced him to a dishonorable discharge, confinement for 1 year, and reduction to E-1. The convening authority approved the sentence as adjudged.

In an issue of first impression for this Court, the appellant challenges his release from confinement under the Mandatory Supervised Release (MSR) program. He challenges both the legality of MSR and its application in his case. Finding no error, we affirm the findings and sentence.

Background

The appellant's minimum release date from confinement was 22 June 2003. His maximum release was 2 September 2003. On 21 February 2003, the Air Force Clemency and Parole Board (AFC&PB) notified the appellant he had been denied clemency and parole, but advised him that the AFC&PB was directing MSR upon his minimum release date. The term of mandatory supervision was to run from 22 June 2003 to 2 September 2003. The appellant was released from confinement on 22 June 2003.

The appellant filed a writ of mandamus with this Court on 14 July 2003, asking for his release from the MSR program and an adjustment to the effective date of his placement on appellate leave. The Writ raised four issues, in **[**3]** substance the same issues raised now on appeal under Article 66, UCMJ, 10 U.S.C. § 866. n1 Citing *Clinton v. Goldsmith*, 526 U.S. 529, 143 L. Ed. 2d 720, 119 S. Ct. 1538 (1999), on 14 August 2003 we held that this Court did not have jurisdiction to grant the requested relief. *United States v. Pena*, ACM 35397, Misc. Dkt. No. 2003-04 (14 Aug 2003) (unpub. op.). On 9 September 2003, the Court of Appeals for the Armed Forces denied the appellant's writ-appeal petition. *United States v. Pena*, 59 M.J. 135 (C.A.A.F. 2003).

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n1 The appellant assigns four errors in this appeal:

> I. Whether the appellant was improperly placed on excess appellate leave and denied pay and allowances in violation of Article 76a, UCMJ, 10 U.S.C. § 876a, when his sentence to confinement was not completed or remitted and he was forced

to fulfill conditions of mandatory supervision upon his release from confinement.

II. Whether the AFC&PB increased the severity of the appellant's sentence in violation of Article 55, UCMJ, 10 U.S.C. § 855, and the Eighth Amendment of the Constitution when it forced the appellant to fulfill conditions of mandatory supervision that are not authorized by the Uniform Code of Military Justice (UCMJ).

III. Whether the imposition of conditions of mandatory supervision on the appellant violates the Due Process Clause of the Constitution because the military judge did not announce a period of MSR or any of the programs conditions as part of the sentence.

IV. Whether the appellant's pleas of guilty are improvident because the military judge did not inform the appellant prior to

accepting his pleas that he could be additionally punished in unspecified ways.

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Jurisdiction to Consider MSR

The threshold issue is whether we have jurisdiction on questions concerning MSR, or whether the program is an administrative consequence beyond the scope of our Article 66(c), 10 U.S.C. § 866(c), review authority. We possess "no . . . authority over actions administering sentences of military prisoners." *United States v. Towns*, 52 M.J. 830, 833 (A.F. Ct. Crim. App. 2000), *aff'd*, 55 M.J. 361 (C.A.A.F. 2001). Further, "as an Article I Court, and thus a creature of Congress, we cannot be certain that we were intended to oversee the conduct of prison affairs at any institution wherein a post-conviction military prisoner is housed, and nothing in our search of our statutory charter or precedent suggests that we were." *United States v. Haymaker*, 46 M.J. 757, 760 (A.F. Ct. Crim. App. 1997), *aff'd*, 50 M.J. 127 (C.A.A.F. 1998).

Mindful of our precedent and limited authority, we do not reject the appellant's challenge simply because his complaint implicates the administration of his sentence. Under Article 66(c), UCMJ, we have the duty and authority to review sentence appropriateness and determine whether the sentence is correct "in law." *United States v. Erby*, 54 M.J. 476, 478 (C.A.A.F. 2001). Therefore, we have the authority to assess the nature and general application of MSR to satisfy ourselves "that the severity of the adjudged and approved sentence has not been unlawfully increased by prison officials, and to ensure that the sentence is executed in a manner consistent with Article 55[, UCMJ, 10 U.S.C. § 855,] and the Constitution." *United States v. White*, 54 M.J. 469, 472 (C.A.A.F. 2001). *See also Erby*, 54 M.J. at 478.

MSR Program

1. The Federal System

MSR is a relatively recent form of conditional release for Department of Defense (DOD)

prisoners, but supervised release has existed far longer in the federal civilian system. "In the Sentencing Reform Act of 1984, § 212(a)(2), 98 Stat. 1999, Congress eliminated most forms of parole in favor of supervised release, a form of postconfinement monitoring overseen by the sentencing court, rather than the Parole Commission." *Johnson v. United States*, 529 U.S. 694, 696-97, 146 L. Ed. 2d 727, 120 S. Ct. 1795 (2000).

Supervised release in the federal civilian system is part of the sentence adjudged. 18 U.S.C. § 3583. n2 MSR functions as:

> a form of government supervision after a term of imprisonment. Unlike parole, which has the effect of reducing the stated term of imprisonment, supervised release is a term of supervision in addition to, and following, a term of imprisonment imposed by a court. Supervised release is similar to probation, with the exception that supervised release follows a term of imprisonment whereas probation cannot be ordered if a term of imprisonment is

imposed for the same or a different offense.

Honorable Harold Baer Jr., *The Alpha & Omega of Supervised Release*, 60 Alb. L. Rev. 267, 269 (1996) (citations omitted).

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n2 *See also* 18 U.S.C. § 3551 (authorized sentences); 18 U.S.C. § 3553(c) (imposition of a sentence; the court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence); 18 U.S.C. App. § 5D1.1 (imposition of a term of supervised release requires the court to order a term of supervised release to follow imprisonment when a sentence to imprisonment of more than one year is imposed or if required by specific statute).

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2. The DOD

The DOD MSR program bears little resemblance to the federal system's scheme of supervised release, primarily because supervised release in the military

is not imposed as part of an accused's sentence.

DOD's version of supervised release must be considered with parole, given the interrelationship between the two forms of release. Parole is defined as a form of "conditional release from confinement under the guidance and supervision of a U.S. [United States] probation officer." DOD Directive (DODD) 1325.4, *Confinement of Military Prisoners and Administration of Military Correctional Programs and Facilities,* E2.1.6 (17 Aug 2001). "Parole may be granted until the expiration of a prisoner's full sentence regardless of good conduct time or other sentence reductions." DOD Instruction (DODI) 1325.7, *Administration of Military Correctional Facilities and Clemency and Parole Authority,* P6.17.9.4 (17 Jul 2001). Parole is voluntary, in that an inmate must apply and be approved for participation. Before being released on parole, the inmate must have an approved parole supervision plan (projecting expected living arrangements and employment situation) and agree in writing to abide by the plan and the conditions of supervision. Air Force Instruction (AFI) 31-205, *The Air Force Corrections System,* P10.15 (9 Apr 2001).

MSR was not explicitly defined in DOD publications when the appellant was placed on supervised release, although the narrative guidance in DODI 1325.7 characterized MSR as a supervised release for prisoners not granted parole prior to their minimum release date. DODI 1325.7, PP1.4, 6.20.1. MSR is now defined as "[a] form of conditional release granted to individuals who have served their sentence to confinement up to their MRD [minimum release date]. This form of release is served until the [adjusted maximum release date], unless otherwise revoked or remitted by the Clemency and Parole Board concerned." DOD 1325.7-M, *DOD Sentence Computation Manual*, AP1.1.12 (27 Jul 2004).

Unlike the federal civilian system, MSR in DOD is not part of the adjudged or approved sentence, and the period of supervision does not extend past a prisoner's maximum release date. The purpose of MSR is described in DODI 1325.7, P6.20.1:

> The supervised release of prisoners who are not granted parole prior to their MRD is a highly effective technique to provide an orderly transition to civilian life for released prisoners and to better protect the

> communities into which such prisoners are released. Accordingly, it shall be the policy of the Department of Defense to use supervised release in all cases except where it is determined by the Service Clemency and Parole Boards to be inappropriate.

Like the DOD publications it implemented, AFI 31-205 did not define MSR when the appellant was placed on supervised release. n3 The current version of the instruction describes the eligibility of prisoners for MSR who are not approved for parole:

> Mandatory supervision only applies to inmates, whose approved finding of guilty included at least one offense that occurred on or after August 16, 2001. The AFC&PB will normally place the following inmates, who are not paroled, under supervised release on their minimum release dates: an inmate convicted of a violent offense or a sex offense (see sex offense list at Enclosure 27, DODI 1325.7), if they have an

> approved sentence to confinement of 12 months or greater; an inmate with an approved sentence to confinement of 3 years or greater; and other inmates deemed appropriate for mandatory supervision by the confinement/corrections facility commander and the AFC&PB. The Board's decision is final. *Inmates placed on mandatory supervised release shall be deemed as if on parole until the expiration of their sentence to confinement.*

AFI 31-205, P10.22 (emphasis added).

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n3 In this opinion, subsequent references to MSR from AFI 31-205 are from the current version of the instruction dated 7 Apr 2004, unless otherwise indicated.

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Unlike parole, MSR is involuntary in the sense the inmate does not apply for it. *See* DODI 1325.7, P1.4.

The primary distinction between MSR and parole is program eligibility, which is based on timing: an inmate is eligible for MSR on his or her minimum release date and for parole on his or her "parole eligibility date." *See* AFI 31-205, P10.12. n4

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n4 Eligibility is the same under current and former instructions.

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In execution, MSR is virtually identical to parole. An inmate selected for MSR must provide the AFC&PE with a release plan and agree in writing to abide by the plan and the conditions of supervision. AFI 31-205, P10.15. "The prisoner's written release plan shall include, at a minimum, the same provisions required of a parole plan." DODI 1325.7, P6.20.2. MSR violations are "considered equivalent to a violation of the terms and conditions of parole and processed" according to parole revocation procedures. DODI 1325.7, P6.20.6. And, as highlighted above, "Inmates placed on mandatory

supervised release shall be deemed as if on parole until the expiration of their sentence to confinement." AFI 31-205, P10.22.

3. The Appellant's Supervised Release

In a 21 February 2003 memorandum notifying the appellant of his MSR, the AFC&PB informed him that failure to provide a release plan would make him "subject to a disciplinary and adjustment board and possible loss of good conduct time, thus

delaying your release." In a declaration from the Review Board Manager at the Naval Consolidated Brig Miramar submitted to this Court by the appellant, he recalled that, "I told Airman Pena that he was required to accept the conditions of the [MSR] certificate and that, if he failed to do so, he may be subject to another court-martial for failing to obey a lawful order and/or dereliction of duty. I also told him that he would be subject to a disciplinary board where he could forfeit good-time credit earned and lose confinement privileges." On 17 May 2003, the appellant submitted a memo to the Miramar brig commander contesting the AFC&PB's decision to place him in the MSR program. In a 10 July 2003

declaration to this Court (originally submitted with his extraordinary writ petition), the appellant contended that he never received a response to his memorandum. Based on matters submitted in response to our 14 January 2005 order to provide information and associated documents, it appears the appellant decided in early June 2003 to sign the MSR paperwork.

The government construes the appellant's decision to sign the MSR paperwork to mean he voluntarily participated in the MSR. But, in his 10 July 2003 declaration, the appellant contended otherwise: "I involuntarily agreed to those [MSR] terms and conditions because I was ordered to do so and, if I refused to do so, I was told I could be subject to a

court-martial and other disciplinary action, including the loss of good-time credit and confinement privileges."

The appellant was required to sign an MSR agreement virtually identical to the standard parole agreement used by the DOD. DODI 1325.7, Enclosure 20. The basic MSR agreement in this case contained 16 specific conditions, with 9 additional

conditions with which the appellant "solemnly promised to abide." The condition of most direct concern to the appellant was participation and progress in a community-based sex offender treatment program, at his own expense, that "should have a duration of at least 24 months" (according to the agreement's conditions).

In his declaration, the appellant described the hardships occasioned by the MSR program. He had to proceed directly to his home of residence in Illinois and was not allowed to stop in Colorado and arrange for his household goods shipment. His required participation in Alcoholics Anonymous took 4 1/2 hours per week between attendance and travel time. His approved sex offender treatment program was in Chicago, which met at mid-day on Mondays and took 4 hours per week between attendance and travel time, and cost him a $ 10 roundtrip train ticket to Chicago each time. And, about every two weeks he had to report to his

probation officer (the MSR is administered through federal probation officers) within 30 minutes of being notified to provide a urine specimen, regardless of his work commitments. He contends

the combined conditions prevented him from finding employment. There is no indication of any problem with the appellant's actual participation in the program.

With 72 days of confinement left to serve, the appellant appeared to have only negative options if he did not agree to the MSR terms--lose his credits and privileges and possibly face a second court-martial. It seems counterintuitive that an inmate would want to remain in jail, but this is a case where there was some logic to it--the appellant would have been released largely obligation-free on his maximum release date.

The appellant signed the MSR agreement on 22 June 2003 and was released. The departure of an inmate from the confinement facility is deemed to constitute acceptance of the terms and condition of supervised release. DODI 1325.7, P6.20.4.

MSR Legal Basis

There is no explicit statutory basis for a DOD version of supervised release. However, the Service Secretaries have been given broad authority to

establish correctional facilities, manage inmate populations, and develop a system for the release of prisoners. Service Secretaries are required to provide for the "education, training, rehabilitation, and welfare of offenders" confined in military correctional facilities. 10 U.S.C. § 951. Congress has specifically provided for a system of parole in the DOD. 10 U.S.C. § 952. And, each Secretary must establish a system for the remission or suspension of the unexecuted part of the sentences of selected offenders. 10 U.S.C. § 953. It is apparent from the legislation enacted in 10 U.S.C. §§ 951-953 that Congress meant the Service Secretaries to have broad discretion in the administration of corrections facilities and treatment of personnel confined. n5

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n5 10 U.S.C. §§ 951-953 originated in House of Representatives (H.R.) 5783, a 1968 bill introduced in the House Committee on Armed Services. The Provost Marshal of the Army testified that the "principal purpose of H.R. 5738 is to attain uniformity among the Armed Forces in the administration of military correctional facilities and

the treatment of persons sentenced to confinement under the Uniform Code of Military Justice." *Subcommittee No. 1 Consideration of H.R. 5783, to Amend Titles 10, 14, and 37, United States Code, to Provide for Confinement and Treatment of Offenders Against the Uniform Code of Military Justice*, 90th Cong. 8373 (1968) (statement of Major General Carl C. Turner, Provost Marshal, United States Army).

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DOD implements these Title 10 provisions through DODD 1325.4 and DODI 1325.7. The directive charges the Service Secretaries to comply with Title 10, Chapter 48, *Military Correctional Facilities*, and allows the Secretaries to "consider release of eligible prisoners from confinement under parole supervision consistent with the ends of justice and public safety." DODD 1325.4, P4.6.

Service Secretaries are directed to accomplish a number of specific tasks, among them:

> Issue regulations on the confinement of military prisoners and administration of military corrections programs and

facilities that are consistent with this Directive. Provide programs for work, education, training, rehabilitation, the welfare of military prisoners, return to duty, and clemency and parole that are consistent with Chapter 47, Sections 801-946, and Chapter 48, of 10 U.S.C., and the MCM [Manual for Courts-Martial.] Retain clemency and parole authority over a member of a Service in that Military

Department, including when the member is located in a correctional facility operated by another Military Department.

DODD 1325.4, P5.3 (subparagraph citations omitted).

The Service Secretaries discharge their corrections responsibilities through clemency and parole boards. The boards assist the individual Secretaries in executing clemency and parole authority and by serving as the primary departmental authority for administration of clemency and parole

policies and programs. DODI 1325.7, P6.16.3. The Secretary of the Air Force created the AFC&PB to assist him as required. AFI 31-205, P10.8.

The Air Force implements supervised release through AFI 31-205. In explaining the "Conditions for Release on Parole/MSR," the instruction provides that:

> The AFC&PB paroles inmates when it is consistent with the ends of justice and as soon as inmates demonstrate they can assume the responsibilities of productive, law-abiding citizens. Parole is not a means to manage inmate populations. Prior to release on parole, inmates must have an approved supervision plan and agree in writing to abide by the plan and the conditions of supervision.

AFI 31-205, P 10.15. The "Parole/MSR" paragraph caption is illustrative of the instruction's guidance on MSR generally; supervised release is clearly treated as a form of parole.

3. Discussion

Although not assigned as a specific error, the appellant urges us to find DOD's MSR program to be illegal. He contends, by analogy to 10 U.S.C. § 952, that MSR must be statutorily authorized and, because Congress has not done so, DOD has exceeded its rulemaking authority by creating an MSR program. We do not agree. We conclude that DOD may establish a MSR program option without explicit authority from Congress. We read 10 U.S.C. §§ 951-953 to grant the Service Secretaries the authority and discretion to fashion programs for the release of inmates. We do not construe Congress' specific authorization of parole in 10 U.S.C. § 952 to prohibit other forms of conditional release not specifically mentioned in the statute. The legislative history indicates 10 U.S.C. § 952 was intended to authorize each Service to have a parole program. Moreover, Congress declined to define what could constitute "parole" by authorizing Service Secretaries to devise a "system of parole." 10 U.S.C. § 952.

After considering the entire regulatory scheme, we reach the inescapable conclusion that DOD's MSR is, for all practical purposes, parole. It may be an involuntary form of our traditional notion of parole, in that the inmate does not ask or apply for it, but it is parole nevertheless. n6 In general, "parole" is the "release of a prisoner from imprisonment before the full sentence has been served." *Black's Law Dictionary* 1139 (7th ed. 1999). Apart from the differences in calculating release eligibility dates, MSR and parole are virtually indistinguishable. Therefore, we conclude that MSR as devised and implemented in the DOD is part of the "system of parole" authorized by 10 U.S.C. § 952.

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n6 The federal civilian courts have reached similar conclusions. "Supervised release is essentially similar to parole. The nature of supervised release, which is normally imposed to follow a term of imprisonment, see 18 U.S.C. § 3583(a), is virtually the same as the nature of

probation, which may be imposed in lieu of imprisonment, see 18 U.S.C. §§ 3561-3566

(1988). *United States v. Meeks*, 25 F.3d 1117, 1121 (2d Cir. 1994). Further:

> Supervised release and parole are virtually identical systems. Under each, a defendant serves a portion of a sentence in prison and a portion under supervision outside prison walls. If a defendant violates the terms of his release, he may be incarcerated once more under the terms of his original sentence. More specifically, a defendant's original sentence determines the length of the term of parole (indirectly) or supervised release (directly). It is also the original sentence that establishes how long the defendant may be required to serve following revocation in the case of both parole and supervised release violations. Finally, it is the original sentence

> that is executed when the defendant is returned to prison after a violation of the terms of both parole and supervised release.

United States v. Paskow, 11 F.3d 873, 881 (9th Cir. 1993).

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Is MSR Punishment?

In his second assigned error, the appellant contends that the MSR terms and conditions amount to punishment. Specifically, he claims that the AFC&PB increased the severity of his sentence in violation of Article 55, UCMJ, and the Eighth Amendment, because he was forced to fulfill conditions of mandatory supervision not authorized by the UCMJ.

We review claims of cruel and unusual punishment under the Eighth Amendment and Article 55, UCMJ, de novo. *United States v. Smith*, 56 M.J. 290, 292 (C.A.A.F. 2002) (citing *United States v. White*, 54

M.J. 469, 471 (C.A.A.F. 2001)). The Supreme Court's Eighth Amendment jurisprudence applies to issues raised under Article 55, UCMJ, alleging confinement was administered in a cruel and unusual manner. *United States v. Brennan*, 58 M.J. 351, 353 (C.A.A.F. 2003). The Supreme Court has concluded that an official violates the Eighth Amendment only when two requirements are met: (1) the deprivation alleged must be, objectively, a "sufficiently serious act or omission" that results in the denial of "the minimal civilized measure of life's necessities," and (2) the prison official must have a "sufficiently culpable state of mind" amounting to "deliberate indifference" to inmate health or safety. *Farmer v. Brennan*, 511 U.S. 825, 834, 128 L. Ed. 2d 811, 114 S. Ct. 1970 (1994). The MSR conditions imposed in the appellant's case were neither cruel and unusual punishment under the *Farmer* Eighth Amendment analysis, n7 nor cruel or unusual punishment under Article 55, UCMJ. *See, e.g., Brennan*, 58 M.J. at 351; *White*, 54 M.J. at 469; *Erby*, 54 M.J. at 476; *United States v. Avila*, 53 M.J. 99 (C.A.A.F. 2000); *United States v. Sanchez*, 53 M.J. 393 (C.A.A.F. 2000).

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n7 *See also Smith v. Doe*, 538 U.S. 84, 105, 155L. Ed. 2d 164, 123 S. Ct. 1140 (2003) (nonpunitive purpose of implementing regulations/instructions).

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Indeed, we do not construe the conditions of MSR as punishment at all. "The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century." *Wilson v. Seiter*, 501 U.S. 294, 300, 115 L. Ed. 2d 271, 111 S. Ct. 2321 (quoting *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985)). Nothing in the record indicates a punitive intent by the DOD, the Air Force, or the AFC&PB in enacting and implementing MSR. Finally, unlike the federal civilian system, supervised release in the DOD is not itself punishment because it is not part of the sentence. *See generally United States v. Gilchrist*, 130 F.3d 1131, 1134 (3d Cir. 1997).

Accordingly, we hold that the AFC&PB did not increase the severity of the appellant's sentence in violation of Article 55, UCMJ, and the Eighth Amendment. n8

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n8 In light of our conclusion about the nature of MSR, we need not decide whether the appellant exhausted his administrative remedies prior to alleging cruel and unusual punishment. We believe the appellant could have requested modification or removal of some or all MSR conditions through his probation officer or to the AFC&PB. However, there is no indication that avenue was clearly explained to him.

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Jurisdiction to Review the Administration of MSR

We have concluded that there is adequate legal authority for a DOD MSR program, and that implementation of the program does not amount to punishment in the military system. The issue remains whether we have jurisdiction to review the actual administration of MSR in the appellant's case. The appellant's first assigned error questioned whether he was "improperly placed on excess appellate leave and denied pay and allowances in

violation of Article 76a, UCMJ, when his sentence to confinement was not completed or remitted and he was forced to fulfill conditions of mandatory supervision upon his release from confinement."

Consistent with this Court's decisions in *Towns* and *Haymaker*, we conclude that we do not have jurisdiction to review MSR administration. Again, we possess "no general supervisory authority with respect to military justice or authority over actions administering sentences of military prisoners." *Towns*, 52 M.J. at 833. The administration of sentences, to include placement of released inmates on excess appellate leave, is a matter left to the military departments. n9

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n9 The Air Force procedures for required and voluntary excess leave are set out in AFI 51-201, *Administration of Military Justice*, P9.12 (2 Nov 1999). We note the instruction should, but does not, explicitly mention MSR in the context of release of inmates on parole and MSR.

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Grafting Federal MSR Practice into the Rules for Courts-Martial

In his final two assignments of error, the appellant would have us graft federal civilian MSR procedures to court-martial practice and procedure. n10 In light of our conclusions above, we find no basis to apply the extensive, and fundamentally different, federal civilian MSR scheme to military practice. There is also no basis to require MSR consideration in military presentencing procedure; it is well established that members are sentenced without regard to collateral administrative effects of the sentence. *United States v. Murphy*, 26 M.J. 454, 457 (C.M.A. 1988); *United States v. Griffin*, 25 M.J. 423, 424 (C.M.A. 1988); *United States v. Quesinberry*, 31 C.M.R. 195, 198, 12 C.M.A. 609 (C.M.A. 1962); *Cf. United States v. Hannan*, 17 M.J. 115, 123 (C.M.A. 1984) (holding that the military judge was free to inquire whether accused and counsel had discussed parole eligibility or other possible collateral results of conviction, but was under no obligation to do so).

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n10 The appellant contends the imposition of conditions of mandatory supervision on him violates the Due Process Clause because the military judge did not announce a period of MSR or any of its conditions as part of the sentence. The appellant also contends that his pleas of guilty are improvident because the military judge did not inform him prior to accepting his pleas that he could be additionally punished in unspecified ways.

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Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.